



**Machiri Limited v NCBA Bank Kenya (Commercial Case E150 of 2023)
[2023] KEHC 22884 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E150 OF 2023
FG MUGAMBI, J
SEPTEMBER 29, 2023**

BETWEEN

MACHIRI LIMITED PLAINTIFF

AND

NCBA BANK KENYA DEFENDANT

RULING

Background

1. This ruling determines the application dated 13th April 2023 which is brought under Order 40 rule 1 and 2, section 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya seeking injunctive orders.
2. The application is premised on the grounds stated on the face of it, the supporting affidavit and supplementary affidavit both sworn by Eng. James Mbugua Macharia, the Managing Director of the applicant, on 13th April 2023 and 6th June 2023 respectively. The applicants' case is further buttressed by the written submissions dated 14th June 2023. The application is opposed through a replying affidavit sworn by Jackson Nyaga, a legal counsel with the respondent, on 19th May 2023.
3. At the heart of the dispute between the parties are three (3) performance bonds issued by the respondent to Rift Valley Water Services Board (the beneficiary), upon the applicant's request. The performance bonds were issued on 19th November 2018 and extended twice. They were finally scheduled to expire on 23rd March 2023. The applicant challenges the decision of the respondent to honour the performance bonds which according to the respondent was a non-complying demand.

Analysis

4. I have carefully considered the pleadings, evidence and submissions raised by rival parties in support of their cases. The main issue is whether the applicant has met the threshold for granting an injunction to



restrain the respondent from making any payments on the performance bonds in question, pending the hearing and determination of the suit herein.

5. Order 40 rule (1) (a) and (b) of the [Civil Procedure Rules](#) 2010 sets out the threshold upon which such an application may be granted. The conditions are now well crystalized and supported by judicial pronouncements including the celebrated case of *Giella v Cassman Brown & Co Ltd*, (1973) E.A 385. For the avoidance of doubt, the criteria requires that:
 - i. An applicant must demonstrate that he has a prima facie case with a probability of success.
 - ii. An applicant must demonstrate that should the orders not be granted, he might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.
 - iii. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.
6. On the first of the three conditions, the Court of Appeal in *Mrao Ltd V First American Bank of Kenya Ltd & 2 Others*, [2003] KLR 125 defined a prima facie case as one in which a Court would conclude, from the face of the evidence tabled by an applicant, that there exists a right which has apparently been infringed sufficient to call for an explanation or rebuttal. The evidence must therefore point to the probability of success of the applicant's case upon trial.
7. In determining whether a prima facie case has been demonstrated, I am cognizant of the limitations of enquiry that are permitted of this court at this point in time. The Court of Appeal in [Nguruman Ltd V Jan Bonde Nielsen & 2 Others](#), [2014] eKLR warned that a Court is not to carry out a mini trial and is not required to examine the merits of a case. Rather, this Court is only required to consider whether, on the face of it, there does appear to be a right that has been threatened with violation.
8. In the dispute before the Court, the issuance and subsequent extension of the performance bonds is undisputed. The bone of contention by the applicant is that the beneficiary did not comply with the terms of the presentation of the bonds and the Uniform Rules for Demand Guarantees. The applicant points out that payment could only be made on the performance bonds upon presentation of the original guarantee plus all the extensions by the close of business on the expiry date, being 23rd March 2023.
9. A cursory look at the evidence on the circumstances surrounding the demand indicates that:
 - i. The beneficiary wrote to the respondent calling up the guarantees and demanding the full payment of the money guaranteed, vide a letter dated 30th March 2023. The respondent attached copies of the performance bonds in this letter.
 - ii. On the same day, the applicant's advocates wrote to the respondent protesting the demand as not compliant.
 - iii. On the same day, 30th March 2023, the respondent wrote to the beneficiary rejecting the demand.
 - iv. Subsequently, the respondent advised the applicant by an email dated 13th April of its decision to pay the performance bond call up upon further review.
 - v. A letter dated 29th March 2023 from the beneficiary to the respondent in response to a letter of 28th March 2023 from the respondent allegedly forwarded the original performance bonds and extensions.
10. The decision by the respondent to make payment to the beneficiary after initially rejecting the demand as a non-complying demand has not been explained. The letter of 29th March 2023 from the beneficiary



submitting the original bonds is also in question and particularly in light of the alleged expiry date of the performance bonds.

11. The respondent maintains that it was under an obligation to pay because the bonds were payable on demand. It has cited the Court of Appeal decision in *Kenindia Assurance Company Limited V First National Finance Bank Limited*, NRB CA Civil Appeal No. 328 of 2002; 2002 eKLR stating that a performance guarantee stands on equal footing with a letter of credit and must therefore be honoured on its terms.
12. The respondent further argues that it was under no obligation to consult with the applicant or seek its consent before deciding to honour the demand as the performance bonds were independent contracts between the respondent and the beneficiary and the applicant was not privy to the same
13. In my view, the validity of the decision to honour the performance bonds and the process that was followed is at the heart of the dispute between the parties. To determine the dispute the Court will be required to interrogate the terms of presentation of the performance bonds as well as the Uniform Rules for Demand of Guarantees. These cannot not be interrogated at this interlocutory stage but only upon production of evidence at the substantive hearing of the suit.
14. On account of this, it is my finding that the applicant has established that it has a prima facie case that raises triable issues for rebuttal by the respondent. It is therefore necessary for the Court to preserve the substratum of the dispute to allow parties litigate on the matter.
15. The second consideration for grant of an injunction is whether the applicant has shown that it might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. The parties have referred the Court to the case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others*, [2016] eKLR. In this matter the Court cited with approval from the Halsbury's laws of England on the definition of irreparable loss as:

“Injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”
16. The respondent argues that no irreparable harm would be occasioned to the applicant which cannot be redressed by an award of damages, if the applicant is successful in its suit. He supports this argument by the fact that the value of the performance bonds is quantifiable and ascertainable.
17. The respondent opposed this argument. It stated that the payment of the bonds will mean a debit of Kshs. 144,568,278/= plus charges and interest from its account. This would cause substantial financial disruption, put the applicant's operations at a standstill and cause breach of its on-going projects and obligations which would in turn ruin the applicant's reputation with its clients.
18. Having considered both submissions, I am satisfied that should the applicant be successful, damages will not be adequate compensation for the loss and inconvenience. The ripple effect that would be caused by payment of the performance bonds is substantial. I have no difficulty finding that the balance of convenience tilts in favour of granting the orders sought by the applicant.

Determination and orders

19. In conclusion, and for the reasons I have stated, the application dated 13th April 2023 is granted in the following terms:



- i. An order of injunction is hereby granted restraining NCBA Bank Limited, the defendant herein whether by itself, its servant, agents or other persons acting under its instructions from making any payments on the performance bond No MD1832000414, MD1832081280 and MD1832039707 all dated 19th November 2018 pending the hearing and final determination of this suit on merits.
- ii. The costs of the application shall await the outcome of the final suit.
- iii. I further direct that parties fix the matter for pre-trial conference at the earliest available date for purposes of having the matter ready for hearing.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 29TH DAY OF SEPTEMBER 2023

F. MUGAMBI

JUDGE

